(1)

Supreme Court, U.S.
FILED
06-386 AUG 10 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DR. MARGIE MCRAE, PETITIONER

v.

RUSSELL BERGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Margie McRae, M.D.,
Pro Per
Box 24818
Oakland, CA 94623-1818
510-832-1551

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether there is arguable probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime.

2. Whether there is arguable probable cause for arrest for an unwitnessed alleged misdemeanor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 19

APPENDIX

Circuit Court Opinion 1a

District Court Decision 3a

Order Denying Rehearing 12a

Relevant Provisions Involved 13a

TABLE OF AUTHORITIES

Page

CASES

AGUILAR V. STATE OF TEXAS, 378 U.S. 108, 110, 84 S.CT. 1509 (1964) 7, 8, 17

BRINEGAR V. UNITED STATES, 338 U.S. 160,175 - 176, 69 S.CT. 1302 ..... 6, 10

CARROLL V. UNITED STATES, 267 U.S. 132, 162, 45 S.CT. 280, 69 L.ED. 543, 39 A.L.R. 790 ..... 6, 7

DEVENPECK V. ALFORD, 160 L.ED. 2D 537, 544 (2004) 2

FLETCHER V. SCREVEN COUNTY, GA. 92 F.SUPP.2D 1377 ..... 11, 14

FRANKS V. DELAWARE, 438 U.S. 154, 166, 98 S.CT. 2674, 2681, 57 L.ED.2D 667 7

GARMON V. LUMPKIN COUNTY, GEORGIA, 878 F.2D 1406, 1410 (11TH CIR.1989) 14

GIORDENELLO V. UNITED STATES, 357 U.S. 480, 78 S.CT. 1245, 2 L.ED.2 1503 (1958) 8, 11, 18

GRAMENOS V. JEWEL COMPANIES, INC., 797 F.2D 4322 ..... 14, 16

HARLOW V. FITZGERALD, 457 U.S. 800, 102 S.CT. 2727, 73 L.ED.2D 396 (1982) 14

JONES V. CANNON, 174 F.3D 1271, 1278 12

JOSEPH V. KIMPLE, 343 F.SUPP.2D 1196 13

KER V. CALIFORNIA, 374 U.S. 23, 83 S.CT. 1623, 10 L.ED.2D 726 7

KINGSLAND V. CITY OF MIAMI, 382 F.3D 1220 15

NATHANSON V. UNITED STATES, 290 U.S. 41, 54 S.CT. 11, 78 L.ED 159 ..... 17, 18

PAYNE V. DEKALB COUNTY, 414 F.SUPP.2D 1158, 1172 14

SAUCIER V. KATZ, 533 U.S. 194, 200, 121 S.CT. 2151 13

SPINELLI V. UNITED STATES, 393 U.S. 410, 413, 89 S.CT. 584 (1969) 9

STONE V. POWELL, 428 U.S. 465, 472, 96 S.CT. 3037 (1976) 10

STATUTES

28 U.S.C. 1254 1

O.C.G.A. 32-10-64(e) 10, 11, 12, 15

O.C.G.A. Section 16-8-2 ..... 1, 13

O.C.G.A. Section 16-8-4 ..... 1, 5, 12

Petitioner Margie McRae, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the appendix at APP. 1a. The opinion of the District Court granting Defendant Berger's motion for summary judgment is unreported and is reproduced in the Appendix at App. 3a.

JURISDICTION

The court of appeals judgment was entered on March 22, 2006. A timely petition for rehearing was denied on May 12, 2006. Appendix at App. 12a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

RELEVANT PROVISIONS INVOLVED

1. The Warrant Clause of the Fourth Amendment to the United States Constitution provides that:... "

O.C.G.A. Section 32-10-64(e)

O.C.G.A. Section 16-8-4

O.C.G.A. Section 16-8-2

STATEMENT

Plaintiff seeks review of the ruling of the

Eleventh Circuit Court of Appeals which held that police officers may arrest if there is arguable probable cause citing *Devenpeck v. Alford*, 160 L.Ed. 2d 537, 544 (2004).

Petitioner seeks review of the Eleventh Circuit's ruling because it did not address an issue of Constitutional significance that has not been directly addressed in the past. The questions address whether arguable probable cause exists when the face of the sworn arrest warrant affidavit is not merely inconsistent with a crime, but rather negates the elements.

This petition arises out of a controversy over a 35 cent toll on the Torras Causeway from Brunswick, Georgia to St. Simons Island, Georgia. Petitioner, a medical doctor and lawyer licensed to practice in California, owns property on St. Simons Island, Georgia and traveled to the area frequently.

When petitioner drove onto the Torras Causeway on March 2, 2003, headed to St. Simons Island to check her property, she entered the exact change lane and attempted to pay the toll, but missed the basket. She had over three thousand dollars in cash and some coins, but did not have any more exact change. Petitioner waited for a time for assistance, but no one came. She then spotted her coins on the ground near the toll machine, got out of her truck, picked them up and paid the toll. The controlling Georgia statute, O.C.G.A. Section 32-10-64(e) authorized a person who has missed the basket to retrieve his or her coins that fell to the ground near the toll machine.

> "After placing the coins in the basket, McRae got in her truck and began to exit the area slowly. However, a Georgia Department of Transportation toll booth operator, Marilyn Rogers, impeded McRae's departure by running in front of McRae's truck and telling her to stop. Rogers saw coins in McRae's hand, and was under the impression that McRae had been taking coins that were not her own from the roadway near the toll booth. Upon Rogers' demand that McRae give Rogers the change in her hand, McRae refused."

(District Court opinion, App. 4a.) "McRae told Rogers she was not going to give Rogers her money. McRae asserts that Rogers did not see her when she first approached the basket, or when she attempted to pay, but missed the basket." Ibid.

> "Rogers threatened to call the police if McRae refused to hand over the money, and McRae agreed to pull over and wait for the police. Berger was the Brunswick police officer who responded to the call. Upon Berger's arrival, Rogers told the officer that she had seen McRae picking up numerous coins all around the coin basket, and that she saw McRae deposit thirty-five cents in the toll basket." (District Court opinion, App. 5a).

> "Rogers did not tell Berger that he [*sic*] saw how the coins came to be on the ground, or how many coins she had seen McRae picking up, she did relate to Berger her understanding that any money that falls on the ground at the toll

booth becomes state property automatically." (District Court opinion, App. 5a.)

"McRae contends that Berger approached her vehicle, and told her 'I can arrest you.' McRae responded that she could not be arrested on hearsay. Berger then told McRae to give the money back, and McRae responded that there was no proof that the money belonged to the state[2]. When Berger asked McRae if she was going to pay the toll, Plaintiff responded that she had already done so. Berger then took McRae's license and went to his police cruiser to run a license and registration check."

(District Court opinion, App. 5a). The Court noted, "fn2 During Berger's deposition, he admitted that at no point did he ask McRae specifically if the money she retrieved from the ground was her own." (District Court opinion, App. 11a.).

"When Berger returned to McRae's pickup, McRae stated 'I've already paid the toll, but here's a dollar I'll pay again.'" (District Court opinion, App. 5a.) "After a discussion about the ownership of her truck and where she got it, Berger arrested McRae and charged her with theft by conversion." (District Court opinion, App. 5a - 6a).

After Dr. McRae's arrest, Cpl. Hall, Berger's supervisor, presented a sworn affidavit to the magistrate stating that he, Hall,

> "...personally makes oath that MCRAE, MARGIE (hereinafter call the Accused) did prior to or, at 01:02pm, on the 03 day of March, in the year 2003, in the county aforesaid, at 200 TORRAS CAUSEWAY, commit the offense of THEFT BY CONVERSION (O.C.G.A. 16-8-4) against STATE OF GEORGIA in that said Accused did then and there after having obtained property lawfully, did then without authority convert said property to HER own use to wit: MARGIE MCRAE EXIT HER CAR AT THE DOT TOLL BOOTH, PICKED UP MONIES AROUND THE TOLL MACHINES, BELONGING TO THE STATE AND USED IT TO PAY HER TOLL, thereby depriving the lawful owner, State of Georgia, Department of Transportation, of said property, and this deponent makes this affidavit that a warrant may issue for his (her) arrest." (emphasis in original).

The statement was sworn to by supervisor Hall and subscribed. Hall correctly affirmed, under oath, that Dr. McRae had obtained the money lawfully.

REASONS FOR GRANTING OF THE PETITION

QUESTION NO. 1

Whether there is arguable probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime. This is an important Constitutional issue of general concern that has not been addressed by this Court. The answer should be,

No, because it would lower the threshold for possible unlawful arrest to a level that eliminates most safeguards that may prevent wrongful deprivation of freedom. Such a holding would effectively abolish standards of behavior, guidelines and balancing that protect the freedom on which this Country was founded, and for which this Country is an example for the rest of the world.

A focus was the adequacy of the investigation done by Brunswick police officer, Berger, but the threshold analysis, arguable probable cause under the *totality of circumstances*, is an even more primary concern as discussed infra.

A Probable Cause and Arrest Warrant Affidavit

Probable cause was defined by Justice Marshall a few hundred years ago, but it was refined by the Supreme Court in the landmark mark case, *Brinegar v. United States*, 338 U.S. 160,175 - 176, 69 S.Ct. 1302. *Brinegar* held that "Probable cause exists where 'the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" citing *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. Like Paganini's theme, there are many variations, but the core concept remained unchanged till the development of arguable probable cause discussed infra. *Brinegar* noted that judgment in a particular situation must consider the totality of circumstances. Id at 176. Thus the totality of circumstances standard dates back to at least 1949.

The Court recognized that mistakes could be made, but they should be the mistakes of reasonable men. Id at 175. These long-prevailing standards were intended to safeguard citizens from unfounded charges of crime while allowing officers leeway. The rule of probable cause was intended to accommodate these competing interests. Id at 176.

The Warrant Clause of the Fourth Amendment to the United States Constitution, enforced against the states through the Fourteenth Amendment per *Aguilar v. State of Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509 (1964), citing *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.ED.2d 726, states that, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation....", *Franks v. Delaware*, 438 U.S. 154, 166, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (internal citations omitted) also noting the requirement that the warrant be issued by a neutral and disinterested magistrate. The Court said, "This case presents an important and longstanding issue of Fourth Amendment law." This case allowed defendants to challenge the veracity of a warrant affidavit at a hearing, addressed possible remedies, and limited the showing of support for probable cause to the face of the warrant affidavit..

At page 2684, the Supreme Court wrote, "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. Applying that presumption to the instant case, Cpl. Hall's arrest warrant affidavit, must be presumed valid and Dr. McRae did indeed lawfully come into possession of the money in question as admitted by supervisory police

officer Hall in his sworn statement. This observation does not resolve the conundrum of how and why the State of Georgia, inferentially, gave Dr. McRae money that she allegedly then converted to her own use. Citing the rule in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2 1503 (1958) and other precedence, the Supreme Court eschewed mere affirmance of belief or suspicion because "[m]ere affirmance of belief or suspicion is not enough." for a warrant. "Fourth Amendment cases findings of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case." *Aguilar* at 1516.

The Supreme Court, in another landmark case, *Giordenello v. United States*, 357 U.S. 480, 485 - 486, 78 S.Ct. 1245, applied the search warrant standards to arrest warrants. The affidavit must be presented to a neutral, detached magistrate, who would determine whether the warrant was supported by probable cause, rather than the officer who might be engaged in the frequently competitive activity of ferreting out crime. Id at 486. An adequate basis for a finding of probable cause had to be on the face of the complaint in the *Giordenello* criminal case or affidavit in Fourth Amendment cases. Id at 487. The *Giordenello* complaint was deficient because it contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein and did not indicate a source for the complainant's belief. *Giordenello* was expanded in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

While recognizing that probable cause could be satisfied by hearsay information, the Supreme Court

held the *Aguilar* affidavit deficient for two reasons. First, the underlying facts necessary to enable the magistrate to independently judge the validity of the informant's conclusion were not presented and second, the affiant officers did not address the credibility of their informant. *Aguilar* was such an important case that this Court granted certiorari for *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584 (1969) "Believing it desirable that the principles of *Aguilar* should be further explicated,..." The *Spinelli* warrant was deficient because the affidavit presented to the magistrate fell short of the *Aguilar* standard for a showing of probable cause. *Spinelli* at 590. Recognizing that magistrates' determinations of probable cause should be paid great deference by reviewing courts, the Supreme Court wrote, "But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

There is a parallel in this case. It is conceded that complainant Rogers had no knowledge of how the coins got on the ground or how many there were. She had no knowledge of what Dr. McRae had picked up, thirty five pennies, or seven nickels, or three dimes and a nickel or any other combination that would add up to thirty-five cents. In his sworn affidavit, Hall admitted that Dr. McRae had lawfully come into possession of the coins she picked up. There was no personal observation of any of Dr. McRae's behavior before toll collector Rogers saw her pick up coins from the ground near the toll booth. As discussed above, there is a presumption of validity with respect to the warrant affidavit, though *Franks* makes it clear that challenge

is permitted. One would hardly expect the affiant to challenge the validity of his own sworn statement. For the charge of conversion, Dr. McRae would have to have lawfully gotten the coins from the alleged victim, the State of Georgia. Since Hall admitted that they came into Dr. McRae's possession lawfully, theft by taking, an alternative charge, was impossible.

Failing to meet the elements of a crime is one thing, but actually negating them is a different, and more compelling, issue. The *ex post facto* arrest warrant, after completion of the custodial warrantless arrest of Dr. McRae, is deficient on its face. The elements are not merely lacking for theft by conversion, theft by taking, O.C.G.A. 32-10-64(e) and any other crime. They are negated.

In *Stone v. Powell*, 428 U.S. 465, 472, 96 S.Ct. 3037 (1976), the United States District Court for Nebraska concluded that a search warrant was invalid because the supporting affidavit was defective under *Spinelli* and *Aguilar* cited above. The District Court limited its probable cause inquiry to the face of the affidavit. The petitioner urged that the police should be able to augment the information on a search warrant affidavit at a suppression hearing, a contention noted by the Supreme Court to have been rejected by that Court several times.

It is a matter of common knowledge that motorists not uncommonly miss the basket at toll plazas. The conclusion arrived at for this unwitnessed event is not reasonable under the *totality of circumstances* articulated by this Court in *Brinegar*, supra. None of these individuals observed, or knew,

any of the events that preceded Dr. McRae's retrieval of her coins authorized by Georgia law, O.C.G.A. 32-10-64(e). Rogers' unfounded belief that money that fell to the ground belonged to the State begs the question whether a person who drops a twenty dollar bill at the State building in Atlanta loses her money to the State. Does fallen money transmute to become State property only when it falls to the ground, or only at toll plazas, and what legitimate State interest would be satisfied by such a policy or rule?

The elements for a crime are not simply lacking here. They are negated by the sworn statement of supervisor, Cpl. Hall, an obviously experienced police officer. The arrest warrant is deficient on its face and there was not even arguable probable cause for the arrest of Dr. McRae under the *totality of circumstances* and the fact that a material portion of what transpired in this misdemeanor allegation over a thirty-five cent toll was not witnessed by complainant Rogers or any police officer, i.e. what Dr. McRae did before Rogers saw her, how the coins got on the ground, how many coins were in issue and the value of those coins. This is the very behavior that concerned this Court in *Giordenello* supra. Arguable probable cause gives a lot of latitude to law enforcement officers, but there must also be the balance this Court discussed in *Giordenello.*

The District Court decision was based on immunity derivative of *arguable probable cause* and that, too, must fail for the same reasons. Arguable probable cause may be present if probable cause is lacking. *Fletcher v. Screven County, GA.* 92 F.Supp.2d 1377 is a year 2000 Georgia case. Quoting a 1999 Eleventh Circuit holding, *Jones v. Cannon,* 174 F.3d

1271, 1278, the Court wrote, "...qualified immunity applies 'if there was ***arguable*** probable cause for the arrest..'" (emphasis in original). The officer was immune '"if a reasonable police officer, knowing what [Kile] knew, could have believed there was probable cause' for obtaining the arrest warrant." Neither complainant Rogers, nor Hall, nor Berger saw how the coins picked up by Dr. McRae got on the ground. None knew how many coins there were. Hall admitted in his sworn statement that Dr. McRae had come into possession of the coins lawfully and is incapable of explaining the circumstances under which the State of Georgia gave Dr. McRae the money she allegedly converted. His statement negates conversion. Theft of money one possessed lawfully is impossible. O.C.G.A. 32-10-64(e) was not violated. Under the totality of circumstance at that toll plaza, it was arguably not reasonable to take the quantum leap to the conclusion that a motorist was stealing money from the State or any of the other crimes posited. Arguably, a well trained officer who patrolled the causeway should be familiar with O.C.G.A. 32-10-64(e), which authorizes a person to pick up his or her coins near a toll when the basket is missed.

O.C.G.A. 16-8-4 is the Georgia statute for theft by conversion, the charge against Dr. McRae. The elements for that crime are not met as Dr. McRae would have first had to lawfully obtain the coins from the State, then convert them to her own use in violation of an agreement or legal obligation. The question was never addressed explaining how Dr. McRae obtained coins from the State of Georgia that she subsequently converted to her own use.

O.C.G.A. 16-8-2 requires that the accused either unlawfully take property from another or lawfully obtain it and refuse to return it. That element can not be met under the totality of the circumstances at that Torras Causeway toll booth at the time of the arrest of Dr. McRae. Probable cause is not possible, and Cpl. Hall's affidavit confirms that impossibility.

There is no crime in this case, as the elements are not met for any crime under statute or common law.

There is no apparent support for arguable probable cause for this warrantless arrest and it should not be salvaged by an *ex post facto* warrant that, on its face, negates any crime. Analysis and decision by this Court would settle that important Constitutional question.

B. Qualified Immunity

Officers performing discretionary duties may have qualified immunity, but that immunity can be lost. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151 described a two part test. The Court would first decide whether a constitutional right would have been violated on the facts alleged, then determine whether the right was clearly established. Neither point is a matter of controversy in this case as both prongs are clearly met. In another Georgia case, *Joseph v. Kimple*, 343 F.Supp.2d 1196, the Court acknowledged, "...it was clearly established law that a police officer would *not* be protected by qualified immunity if he applied for an arrest warrant where 'a reasonably well-trained officer ... would have known that his affidavit failed to establish probable cause and that he should not have

applied for the warrant..' *Garmon v. Lumpkin County, Georgia*, 878 F.2d 1406, 1410 (11th Cir.1989);" (emphasis in original).

In order to avail himself, or herself, of the immunity available, that immunity is qualified and the behavior must be reasonable and such that a reasonable police officer, knowing what the involved officer knew, could have believed there was probable cause for obtaining an arrest warrant, *Fletcher v. Screven County, Georgia*, 92 F.Supp.2d 1377, 1380 (S.D.Ga. 2000). The officer's subjective belief is irrelevant.

Gramenos v. Jewel Companies, Inc., 797 F.2d 4322, a Seventh Circuit case, noted expansion of the official immunity of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), a case of national interest. But immunity is limited to qualified immunity or good faith.

C. Arguable Probable Cause

Another Georgia court, *Payne v. DeKalb County*, 414 F.Supp.2d 1158, 1172 wrote, "To determine whether an officer has probable cause to make an arrest, one must first identify the elements of the statute used to arrest the suspect and compare the evidence, known to the arresting officer, with these elements." The question presented seeks to answer how arguable probable cause applies in this circumstance. In *Payne*, one officer was deemed to have arguable probable cause because he relied on a representation that a magistrate was going to issue an arrest warrant for the arrest of the plaintiff. Another officer, after analysis by the court, was not entitled to

immunity based on that officer's conduct. The result was similar in *Kingsland v. City of Miami*, 382 F.3d 1220, a 2004 Eleventh Circuit case, in which officers engaged in transparent wrongdoing to protect a fellow officer who was involved in an automobile collision with plaintiff.

Arguable probable cause appears not tenable in the case under consideration, based on the *totality of circumstances* discussed above and affiant Hall's sworn statement that negates any crime. There was no conversion as the State, obviously, never gave Dr. McRae any monies that she subsequently converted to her own use, and there was no theft by taking as Hall acknowledged that Dr. McRae had obtained the monies lawfully.

Additionally, Dr. McRae's behavior was authorized by a specific Georgia statute, O.C.G.A. 32-10-64(e), as discussed above.

There was no exigency as noted in the District Court opinion. Dr. McRae left the toll plaza slowly. She waited for Officer Berger. The amount involved was de minimis, thirty-five cents.

For the reasons discussed, petitioner respectfully requests review by this Court to address the question presented that is of general Constitutional concern:

Whether there is probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime.

QUESTION NO. 2

A. Arguable Probable Cause

Whether there is arguable probable cause for arrest for an unwitnessed misdemeanor. This is an important Constitutional issue of general concern that has not been addressed by this Court. The answer should be, No, because the cost to society is too great. The lives of many law abiding, productive citizens are subject to irreparable disruption based on mere suspicion or belief that a minor wrong has been perpetrated. Accusations based on unwitnessed behavior are inherently subject to misinterpretation or misunderstanding and the adverse impact on the person affected can be considerable. There should be a balance between the interests of law enforcement and the interests of the people to be protected by the Constitutional safeguards.

Gramenos v. Jewel Companies, Inc., 797 F.2d 4322, a Seventh Circuit case, contained an extensive policy discussion of arrest for a misdemeanor starting with the common law rule that an officer may make a custodial arrest for a misdemeanor only if the crime was committed in his presence.

> "The rule reflects a widely-held belief that misdemeanors should be prosecuted by citation unless the officer has seen the crime committed, which greatly reduces the chance of mistaken arrest. Those stopped for misdemeanors such as traffic offenses usually are cited and released on the spot after posting bond. Most reports of

> misdemeanors will not produce a sentence of custody (as opposed to a fine or probation), so a custodial arrest itself becomes a substantial part of the penalty." (*Gramenos* at 441).

"The A.L.I. Recommends a statute allowing a custodial arrest for a misdemeanor if the officer has reasonable cause to believe that the suspect will not appear in response to a summons or will injure himself or others." (*Gramenos* at 441). The District Court noted, in its opinion, that Dr. McRae had started driving off slowly and waited for the police. Officer Berger admitted that Dr. McRae's actions suggested that "she wouldn't have thought that she committed an offense." [R-19-(Berger depo. At 47)]. No exigent circumstances were described.

In *Aguilar v. State of Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509, the Supreme Court wrote, "We granted a writ of certiorari to consider the important constitutional questions involved." In its discussion, the Court cited *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed 159 at *Aguilar*, p. 112, "The Court, noting that the affidavit 'went upon a mere affirmation of suspicion and belief *without any statement of adequate supporting facts*,' id., 290 U.S. at 46, 54 S. Ct. at 13 (emphasis added), announced the following rule:

> 'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.'

Id., 290 U.S. at 47, 54 S.Ct. at 13. (Emphasis added.)."

It is settled that Fourth Amendment standards for search warrants apply to arrest warrants, *Giordenello v. United States*, 357 U.S. 480, 485 - 486, 78 S.Ct. 1245, 2L.Ed.2d 1503. Complainant Rogers admitted that she did not see any of the events before she saw plaintiff picking up coins. These events occurred at a toll booth machine where, as a matter common knowledge, people miss the basket when tossing coins. Under the totality of circumstances, it may not have been reasonable for toll collector Rogers to take a quantum leap to the conclusion that Dr. McRae was stealing money rather than retrieving her property she had dropped, as authorized by Georgia law, when Rogers had witnessed none of Dr. McRae's behavior during the several minutes Dr. McRae had sat there waiting for assistance (District Court opinion, App. 4a.) Rogers subjective thoughts are irrelevant. The legal standard refers to reasonableness. By the same token, it begs the question whether a $20,00 bill dropped inadvertently at the State building in Atlanta becomes transmuted to State property simply because it landed on State grounds, what State interest would deem it so, and who might come to such a conclusion.

If the potentially draconian effects of arguable probable cause extend to misdemeanors, it would seem there should be some balance between the interest of law enforcement and the interest of the individual subjected to loss of freedom and other untoward consequences in the event of an unlawful arrest for a petty incident that was not even witnessed, as in this case, where the amount on which the false charge was

based was a de minimis thirty-five cents, less than the cost of a first class postage stamp. The District Court misstated, in its opinion, that Dr. McRae's arrest record had been expunged. That is not correct. It was correctly stated that the charge was dismissed and there was an expungement order, but there has been no expungement.

B. Qualified Immunity

The Qualified Immunity discussion above applies and is not duplicated here. A balancing of interests is reasonable and guidelines would serve the interests of both zealous law enforcement officers and those who would be protected from false arrest and charges.

For the reasons discussed, an opinion is requested of this Court as to whether there is probable cause for arrest for an unwitnessed misdemeanor.

CONCLUSION

For the foregoing reasons, a writ should be granted.

Respectfully submitted,
Margie McRae, M.D., In Pro Per
Box 24818
Oakland, CA 94623-1818
510-832-1551

(any footnotes trail end of each document)

No. 05-16527 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DR. MARGIE MCRAE,
Plaintiff-Appellant,

Versus

RUSSELL BERGER,
Defendant-Appellee.

March 22, 2006, Decided

March 22, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Margie McRae, Dr., Appellant: George Brian Spears, Law Office of Brian Spears, ATLANTA, GA.

For Russell Berger, Appellee: Terry A. Dillard, Attorney at Law, Waycross, GA.

JUDGES: Before CARNES, PRYOR and COX, Circuit Judges.

OPINION: PER CURIAM:

Dr. Margie McRae appeals the summary judgment granted for Officer Russell Berger of the City of

Brunswick, Georgia Police Department. McRae's complaint alleges a federal claim for violation of her Fourth Amendment rights and state law claims for false imprisonment and wrongful arrest. The district court found that all McRae's claims fail, as a matter of law, because Berger is entitled to qualified immunity with respect to the federal claim and official immunity with respect to the state law claims. McRae's appeal challenges only the judgment on the federal claim; her appellate brief does not address the district court's finding of official immunity under state law.

On the merits of the appeal, having considered the briefs and relevant parts of the record, we find no error in the district court's grant of summary judgment. The judgment of the district court is affirmed.

AFFIRMED.

D. C. Docket No. 05-00043-CV-2.
United States District Court
for the Southern District of Georgia.

DR. MARGIE MCRAE,
Plaintiff,
versus
RUSSELL BERGER,
Defendant.

10/26/05

ORDER

Plaintiff, Dr. Margie McRae, filed the above-captioned case against Defendant, Russell Berger, asserting a federal claim for violation for her Fourth Amendment rights, and state law claims for false imprisonment and wrongful arrest.

Presently before the Court is Berger's motion for summary judgment, Because Berger had arguable probable cause to believe that McRae committed a crime, the motion will be GRANTED.

BACKGROUND

Margie McRae is a medical doctor and lawyer, licensed to practice in California. McRae owns property on St. Simons Island, Georgia, and is in the habit of visiting Georgia regularly. At about 1:00 P.M. on March 2, 2003, McRae pulled into an exact change toll booth on the F. J. Torras causeway between Brunswick and St. Simons island. At that time, a toll of thirty-five cents was required to be paid to gain admittance to the island.

McRae contends that she had the exact change required when she pulled up to the toll booth.

When McRae attempted to throw her change into the unmanned toll basket, she missed. McRae tried to locate more change in her truck to pay the toll, but could not find exact change to do so. Unsure of her next move, McRae waited in her pickup truck for about five or ten minutes. When it became obvious to her that no assistance or guidance was forthcoming from the authorities running the toll both, McRae got out of her truck, and picked up a quarter and a dime that were located near her truck. McRae alleges that these were her own coins that had missed the toll basket.

After placing the coins in the basket, McRae got in her truck and began to exit the area slowly. However, a Georgia Department of Transportation toll booth operator, Marilyn Rogers, impeded McRae's departure by running in front of McRae's truck and telling her to stop. Rogers saw coins in McRae's hand, and was under the impression that McRae had been taking coins that were not her own from the roadway near the toll booth. Upon Rogers' demand that McRae give Rogers the change in her hand, McRae refused.

McRae maintains that she refused Rogers' demand because the coins in her hand were her own - the change that she found in her truck after missing the toll[1] basket. McRae told Rogers that she was not going to give Rogers her money. McRae asserts that Rogers did not see her when she first approached the basket, or when she attempted to pay, but missed the basket.

Rogers threatened to call the police if McRae refused to hand over the money, and McRae agreed to pull over and wait for the police. Berger was the Brunswick police officer who responded to the call. Upon Berger's arrival, Rogers told the officer that she had seen McRae picking up numerous coins all around the coin basket, and that she saw McRae deposit thirty-five cents in the toll basket.

Rogers told Berger that he had demanded the return of the coins that were in McRae's hand, but that McRae refused. While Rogers did not tell Berger that she saw how the coins came to be on the ground, or how many coins she had seen McRae picking up, she did relate to Berger her understanding that any money that falls on the ground at the toll booth becomes state property automatically.

McRae contends that Berger approached her vehicle, and told her "I can arrest you." McRae responded that she could not be arrested on hearsay. Berger then told McRae to give the money back, and McRae responded that there was no proof that the money belonged to the state.[2] When Berger asked McRae if she was going to pay the toll, Plaintiff responded that she had already done so. Berger then took McRae's license and went to his police cruiser to run a license and registration check.

When Berger returned to McRae' s pickup, McRae stated "I've already paid the toll, but here's a dollar I'll pay again." Berger then asked McRae who owned the truck. Because she had already produced her vehicle registration and proof of insurance, she responded "What do you mean whose truck is this?

You just rare the registration." Berger then clarified his question by asking where Plaintiff got the truck. McRae told the officer that this information was irrelevant.

At that point, Berger told McRae to get out of her vehicle and place her hands behind her back. McRae was placed under arrest, transported to the Brunswick Police Department for booking, and detained at the Glynn County detention center. Berger charged McRae with theft by conversion. After four days in Jail, Glynn County State Court Judge Orion Douglass released McRae on her own recognizance. Subsequently, the charges against McRae were dismissed, and the record of her arrest was expunged.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts are "material" if they could affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

The Court must view the facts in the light most favorable to the non-moving party, Matsushita Elec. Indus. Co. , Zenith Radio Corp., 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in his favor. . . ", United States v. Four Parcels of Real

Property, 941 F.2d 1428, 1487 (11th Cir. 1991) (en banc) (internal quotation marks omitted).

DISCUSSION

I. Berber Is Entitled to Qualified Immunity Under Federal Law

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow Fitzgerald, 457 U.S. 800, 818 (1982). In evaluating a qualified immunity defense, the Court must first determine if the plaintiff's rights were violated at all. Wilson v. Layne, 526 U.S. 603, 609(1999). The court need not proceed beyond that inquiry in this case.

McRae argues that Berger violated the Fourth Amendment to the United States Constitution by arresting her without probable cause. Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing the offense.'" Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (quoting v. Ohio, 379 U.S. 89, 91 (1964)). "who probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." Devenpeck v. Alford, 160 L.Ed. 2d 537, 544 (2004).

Yet, the probable cause inquiry is not restricted by the offense actually invoked bar the officer at the time of the arrest. Rather, the "officer's state of mind (except

for the facts that he knows) is irrelevant to the existence of probable cause." Id. at 545. In other words, it is sufficient if probable cause exists to believe that a crime was committed.

"[E]venhanded law enforcement is best achieved bar the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990).

Qualified immunity applies when then is arguable probable cause for an arrest. If under all the facts known to the officer at the time of the arrest, a reasonable officer could have believed that probable cause was present, arguable probable cause exists. Durruthy v. Pastor, 351 F. 3d 1080, 1089 (11th Cir. 2003) ; Thorton v. Macon, 132 F.3d 1395, 1399 (11th Cir. 1998).

Relevant to the facts here, Georgia law provides that:

Any person, except an authorized agent or employee of the authority, who removes any coin from the pavement or ground surface within 15 feet of a toll collection booth or toll collection machine, except to retrieve coins the person dropped while attempting payment of that Persons toll, shall be guilty of a misdemeanor.

a. Code Ann. § 32-10-64(e) (2001).

Rogers related to Berger that she had seen McRae outside her truck picking up numerous coins from all around the coin basket, and that she saw the change in

McRae's immediate physical possession after McRae deposited thirty-five cents in the toll basket. Rogers also told Berger that McRa refused to hand over the change when confronted. After discussing the events with Rogers, Berger spoke with McRae about the incident. McRae does not contend that she ever told Berger that she had only picked up her own coins from the ground. Instead, she told him that "there was no proof that the money belonged to the state." Had she explained that she had only left her truck to retrieve her coins, she may well have diffused the confrontation, and averted arrest.

Based on the facts known to Berger at the time of the arrest, a reasonable officer in his position cold have determined that probable cause existed to conclude that McRae violated the law by taking coins from near the toll booth that were not her own. Ga. Code Ann. Sec. 32-10-64(e) (2001).

McRae argues that there was no arguable probable cause to conclude that she had committed a crime because Berger did not know of his own knowledge that the coins McRae packed up were not her own. Such an argument is not well-founded. Law enforcement officials need not witness a crime take place to have probable cause to make an arrest.

McRae also asserts that Berger's knowledge that McRae picked up coins near the toll booth could not have given rise to a reasonable conclusion that the coins belonged to the state. Yet, such a fact need not be proven to support the motion that McRae violated the law. If an officer could have reasonably concluded that McRae picked up coins that were not her own, then

arguable probable cause existed to conclude that McRae violated the law. In sum, Berger is immune from suit under federal law because he had arguable probable because to believe that McRae violated Georgia Code section 32-1-64(e).

II. Berger Is Entitled to official Imununity Under State Law McRae asserts that Berger is liable for false imprisonment and wrongful arrest under Georgia law.

The Georgia Constitution provides:

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers, and employees of the state or its departments and agencies may be subject to suit and . . may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

Art. I, Sec. II, Par. IX (d) .

McRae concedes that a police officer's decision to arrest a citizen qualifies as a discretionary act. Under Georgia law, the doctrine of official immunity functions to shield a public employee's discretionary decisions, made in good faith, from a review of his judgment in hindsight. Cameron v. Lang, 274 Ga. 122, 123 & n. 6 (2001). Berger contends that there is no evidence that he acted with

actual malice, or with a deliberate intent to commit a wrongful act, and that he is immune from suit under Georgia law as a result. Merrow v. Hawkins, 266 Ga. 390, 391-92 (1996)

The Court agrees that there is no evidence that Berger acted with actual malice in arresting McRae. Rather, the facts demonstrate that the officer had arguable probable cause for the arrest. Berger is entitled to official immunity under Georgia law.

CONCLUSION

For the reasons explained above, Berger's motion for summary judgment is GRANTED. See Dkt. No. 13. The Clerk is directed to enter judgment accordingly.

SO ORDERED, this

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

fn1McRae had three quarters, a nickel, and a number of pennies in her hand.

fn2During Berger's deposition, he admitted that at no point did he ask McRae specifically if the money she retrieved from the ground was her own.

fn3 Berger had arguable probable cause to conclude that McRae took coins that were not her own even though Rogers could not tell him the exact number of coins that McRae had picked up. Berger Dep. 50.

No. 05-16527 Non-Argument Calendar

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. MARGIE MCRAE,
Plaintiff-Appellant,

versus

RUSSELL BERGER,
Defendant-Appellee.

5/12/06

Appeal from the United States District Court for the Southern District of Georgia. D. C. Docket No. 05-00043-CV-2.

Before CARNES, PRYOR and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

O.C.G.A. 32-10-64(E) EXERCISE OF TOLL POWERS

Any person, except an authorized agent or employee of the authority, who removes any coin from the pavement or ground surface within 15 feet of a toll collection booth or toll collection machine, except to retrieve coins the person dropped while attempting payment of that person's toll, shall be guilty of a misdemeanor.

O.C.G.A. 16-8-4 THEFT BY CONVERSION

(a) A person commits the offense of theft by conversion when, having lawfully obtained funds or other property of another including, but not limited to, leased or rented personal property, under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property he knowingly converts the funds or property to his own use in violation of the agreement or legal obligation. This Code section applies whether the application or disposition is to be made from the funds or property of another or from the accuser's own funds or property in equivalent amount when the agreement contemplates that the accused may deal with the funds or property of another as his own.

(b) When, under subsection (a) of this Code section, of officer or employee of a government or of a financial institution fails to pay on an account, upon lawful demand, from the funds or property of another held by him, he is presumed to have intended to convert the funds or property to his own use.

(c)(1) As used in this subsection, the term "personal property" means personal property having a replacement cost value greater than $100.00, excluding any late fees and penalties, and includes heavy equipment as defined in paragraph (2) of Code Section 10-1-731 and tractors and farm equipment primarily designed for use in agriculture.

(2) Any person having any personal property in such person's possession or under such person's control by virtue of a lease or rental agreement who fails to return the personal property within five days, Saturdays, Sundays, and holidays excluded, after a letter demanding return of the personal property has been mailed to such person by certified or registered mail, return receipt requested, at such person last known address by the owner of the personal property or by the owner's agent shall be presumed to have knowingly converted such personal property to such person's own use in violation of such lease or agreement.

(3) In the event that any personal property is not returned as provided for in the lease or rental agreement and the court orders the lessor or renter to pay replacement costs, replacement costs shall include but not be limited to:

(A) The market value of the personal property. The market value shall be established by the owner of the property by providing from a supplier of such or reasonably similar personal property a current quotation of the value of the person property which is of like quality, make, and model of the personal property being replaced. The value to be awarded shall e the higher of:

(I) The value on the date when the conversion occurred; or

(ii) The value on the date of the trial;

(B) All rental charges from the date the rental agreement was executed until the date of the trial or the date that the property was recovered, if recovered; and

(C) Interest on the unpaid balance each month at the current legal rate from the date the court orders the lessor or renter to pay replacement costs until the date the judgment is satisfied in full.

(4) If as a part of the order of the court the lessor or renter is placed on probation, supervision of said probation shall not be terminated until all replacement costs, fees, charges, penalties, interest, and other charges are paid in full. All payments relative to this Code section shall e made to the appropriate court of jurisdiction and the court shall make distribution to the owner within 30 days of receipt thereof.

(5) In the event that the owner incurs any expenses in the process of locating a lessor or renter who did not return any personal property according to the lease or rental agreement, the court shall provide that the lessor or renter reimburse toe owner for those expenses which may include, but not be limited to, credit reports, private detective fees, investigation fees, fees charged by a law enforcement agency for such services as police reports, background checks, fees involved with swearing out a warrant for incarceration, and any other bona fide expenses.

O.C.G.A. 16-8-2 THEFT BY TAKING

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of

another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.